IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 330 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DR KRISHNAKANT DURGESHBHAI GOR

Versus

STATE OF GUJARAT

Appearance:

MR AJ PATEL for Petitioner

MR ST MEHTA ASSTT. PUBLIC PROSECUTOR for Respondent No. 1

NOTICE SERVED for Respondent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 04/08/2000

ORAL JUDGEMENT

This is a Criminal Revision Application under Sec.401 read with Sec. 397 of the Criminal Procedure Code, 1973 (for short "Cr.P.C.") filed by the accused Dr.

K.D.Gor challenging the correctness, legality and propriety of an order dt. 23rd February, 1989 passed below final report under Sec. 173 of Cr.P.C. submitted by the Police Inspector, D.C.B. Ahmedabad in the matter of Crime Register No. I 357/86 of Shaher Kotada Police Station, Ahmedabad.

2. The revision petition is an accused of CR.No. I 357/86 of Shaher Kotada Police Station, Ahmedabad, while revision opponent no.2 who is the complainant of that case, and therefore, the parties will be referred to hereinafter as the complainant and accused respectively for the sake of convenience.

3. The facts leading to this Criminal Revision Application, in a nutshell, are as follows:-

It is the case of the prosecution that on 10/07/1986 at about 07-30 p.m. Hasmukhlal Dhirajlal Bhavsar who was a son of original complainant was beaten with stick by police and in that incident, he received some injuries on his four fingers. On 11/7/86, he was brought to Shardaben General Hospital, Saraspur, Ahmedabad in which the accused was then serving as an Anesthetist.

Hasmukhlal was admitted in that hospital on 11th July, 1986 at about 10-00 O'clock in Emergency (Casualty) Ward. Thereafter, he was shifted to Orthopaedic Ward and further treatment was given to him. On further examination of the said patient, it was decided that he should be operated upon on 14th July, 1986. The operation was described as "Scraping and Bone-grafting". Usual procedure was followed prior to the performance of operation, and thereafter, the operation was performed on 11th July, 1986. Before the Surgeon started to perform the operation on the said patient, the accused administered anesthesia to the patient and operation was performed. Thereafter, all of a sudden at about 11-30 a.m. the condition of the patient became serious. As per the case of the prosecution, the patient died on 20th July, 1986, while he was in hospital. It is the case of the prosecution that because of negligence on the part of the accused while administering anesthesia, and as a result of anesthesia given to the parties, the patient died, and therefore, it is the case of the prosecution that the accused has committed an offence punishable under Secs. 284 and 304A of the Indian Penal Code (for short "I.P.Code").

4. The father of the patient lodged a complaint in

Shaher Kotada Police Station on 15th July, 1986. That complaint came to be registered as CR.NO. I 357/86. The Police Inspector, D.C.B.Ahmedabad City, conducted the investigation and ultimately on or about 3rd December, 1987, submitted his final report under Sec. 173 of Cr.P.C. In that final report, the Police Inspector requested the court to grant " C Summary ". That report was placed before the learned Metropolitan Magistrate, Court No.3, Ahmedabad on 8th December, 1987. On 8th December, 1987, a show cause notice was ordered to be issued against the complainant as to why "C Summary " should not be granted as prayed for by the Police Inspector. Thereafter the learned Metropolitan Magistrate, Court No.3, Ahmedabad (who will be referred to hereinafter as the "learned Magistrate"), heard the parties and after perusal of the papers, he by passing an order dated 23rd February, 1989, took the cognizance of an offence punishable under Sec. 304A of I.P.Code against the accused. While passing the said order, the learned Magistrate assigned certain reasons for coming to a conclusion for taking the cognizance against the accused.

Being aggrieved against and dissatisfied with the said order dated 23rd February, 1989, passed below the final report submitted by the Police Inspector under Sec. 173 of Cr.P.C., the accused has preferred this Criminal Revision Application challenging the correctness, legality and propriety of the said order.

5. I have heard Shri A.J.Patel, the learned advocate for the revision petitioner and Shri S.T.Mehta, the learned APP for the revision opponent i.e. the State of Gujarat. Shri A.J.Patel has taken this court through the order challenged in this Criminal Revision Application. He has produced xerox copies of certain documents during the course of his arguments. It is his main contention that the learned Magistrate has not taken into consideration the documents which he has produced today in the court while passing the impugned order. It is his say that copies of these documents were produced by the Police Inspector along with his final report. He has further argued that the order challenged in this Criminal Revision Application should be set aside and the learned Magistrate be directed to consider the documents which he has produced today in the case, and then pass an appropriate order after hearing both the parties. During the course of arguments, he has referred to all the copies of the documents which he has produced today before this Court.

6. Shri S.T.Mehta, the learned APP for the revision opponent no.1 has resisted this application on the ground that at this juncture, all these papers cannot be taken into consideration by this Court because the documents are concerning to a technical subject and more particularly, they are on the subject of medical jurisprudence, and some evidence is required to be led, to understand, on those documents. He has further argued that here in this case, the learned Magistrate has taken the cognizance of an offence punishable under Sec.304A of I.P.Code against the accused. At the time of taking the cognizance, the learned Magistrate is required to satisfy himself as to whether there is sufficient ground for proceeding, and if case appears to be a summons triable, he can issue summons for attending the witnesses in the case. Here in this case, the learned Magistrate has issued the summons and thereafter he took the cognizance for an offence punishable under Sec.304A of I.P.Code against the accused.

7. In support of his arguments, Shri S.T.Mehta, the learned APP for the State has cited a decision in case of H.S.BAINS VS. THE STATE (UNION TERRITORY OF CHANDIGARH), reported in AIR 1980 SUPREME COURT, 1883. The Hon'ble Supreme Court has made the position of law clear with regard to taking of the cognizance of offence in such type of matter when Police has submitted a final report. It is held as under:-

" A Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things:

(1) he may decide that there is no sufficient ground for proceeding further and drop action;

(2) he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;

(3) he may take cognizance of the offence under Sec.190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 202.

Here in this case, the learned Magistrate did not agree with the request made by the Police Inspector of Shaher Kotada Police Station, and therefore, he has taken the cognizance under sec.190(1)(b) of Cr.P.C., and thus, he was legally entitled to take the cognizance, and therefore, in no case, it can be said that the learned Magistrate had no jurisdiction to pass such order as he has passed the order within the bounds of Section 190(1)(b) of Cr.P.C.

7. Now the question arises as to whether he correctly took the cognizance of offence under Sec.304A of I.P.C. against the accused or not. For taking the cognizance, the learned Magistrate is only required to be satisfied that there is a prima facie case and sufficient ground for proceeding further in the case and not for the conviction. In case of J.R.D.TATA, CHAIRMAN, TATA IRON & STEEL COMPANY LTD. AND ETC. vs MRS PAYAL KUMAR AND ANOTHER, 1987 Cr.L.J. 447, Delhi High Court has relied on the decision of SMT. NAGAWWA Vs. VEERANNA SHIVALINGAPPA KONJALGI AND OTHERS, reported in 1976 SC 1947 and has held as under:

" At the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same, and is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. The Magistrate is not required to go into the detailed discussion of the merits or demerits of the case."

It is further held as under:-

" That being the legal position, the Magistrate was not supposed to weigh the evidence meticulously as if he were the trial Court. Moreover the standard to be adopted by the Magistrate in scrutinising the evidence at the stage of Sections 203 and 204 is not the same as the one which is to be kept in view at the stage of framing the charges."

So at the time of taking cognizance, the learned Magistrate is required to come to a conclusion as to whether there is a prima facie case to proceed against the accused and that is only for taking the cognizance and not for the conviction. Here in this case, the Police Inspector submitted the papers which the Investigating Officer collected during the investigation.

The learned Magistrate has specifically mentioned in his order that he read the papers and after making perusal of that papers, he has come to a conclusion for issuance of summons against the accused and thereafter he has taken the cognizance of offence on the basis of the papers submitted, by the Investigating Officer, before him. He has assigned three reasons for arriving at the conclusion that there is a prima facie case for proceeding further against the accused -(i) Admittedly, accused had given anesthesia to the patient before the operation started. In this connection, the learned Magistrate has observed in his order that in a normal course, the patient would come out from stage of unconsciousness within four to five hours after administering anasthesia. Herein this case, the patient regained his consciousness after 36 hours and later on the patient died. (ii) As per the expert, Hasmukhbhai died as no sufficient oxygen was available to brain, and therefore, he died. The expert has not given any reason as to why the brain could not receive sufficient oxygen after the operation. The learned Magistrate has observed that the experts are not clear as to whether the brain would receive oxygen in sufficient quantity, if over-doze of anesthesia is given to the patient and (iii) Shri Dr. K.D.Gor i.e. accused left the Operation Theatre after giving the anesthesia and he did not remain present. These three circumstances were weighed with by the learned Magistrate and he ultimately came to the conclusion that there is a prima facie case to proceed further in the case. As discussed earlier, at the stage of taking the cognizance of the offence against the accused, the learned Magistrate himself has not to predetermine himself that if the trial would take place, the accused would be convicted.

8. Shri A.J.Patel, the learned advocate for the revision petitioner has argued that looking to the papers which he has submitted today before this Court, it cannot be said that the accused was negligent. This argument cannot be considered at this stage because the papers which are produced today are relating to medical treatment given to the patient and in order to understand these medical papers, the opinion and evidence of the medical expert is very much necessary. Without any evidence from the side of the expert, it is not possible to straightway consider the arguments of Shri A.J.Patel. Shri A.J.Patel has further argued that there is no nexus between the act of giving anesthesia and death. In the papers produced by Mr. Patel, there is a copy of Post-Mortem Note and in Column No.23, it is mentioned to the effect that "the cause of death is pending till histopathology report of lung & brain and chemical

analysis report of viscera is available". Thereafter, Dr. Deshmukh, Department of Forensic Medicine, B.J.Medical College, Ahmedabad issued the certificate dt. 16/10/1986 in which a final cause of death is shown and according to him, the following the cause of death is shown:-

" The cause of death is coma as a result of cerebral Hypoxia. Evidences present over body suggestive of Surgical procedure. Circumstancial evidences should be considered corelating to the Surgical & anesthetic procedures".

At this juncture, it is not necessary to go into evidence because it requires some appreciation on that evidence which can only be done after both the parties are allowed to lead evidence in the case. It is very difficult at this stage to straightway come to a conclusion that there is no prima facie case to take the cognizance of offence. It may happen that if the parties are allowed to lead their evidence, then the accused may get all possible defence. It may be that when trial will begin, he may give an application under Sec.258 of Cr.P.C to stop the proceedings, provided he satisfies the court, then the court may stop the proceeding, and therefore, at this juncture, it is very difficult to come to a conclusion that there is no prima facie case to do so. In support of his arguments, Shri A.J.Patel cited the following authorities

(1) STATE OF GUJARAT vs. DR. MALTIBEN VALJIBHAI SHAH, reported in 1993 (2) G.L.R. 1600. This case was decided after the full trial and in that case, this Court considered the evidence led by the prosecution in the full trial court, and then this Court has explained as to what is meant by "criminal rashness", "criminal negligence" and "culpable rashness". Looking to the facts and circumstances of that case, this authority is not applicable to the facts and circumstances of the present case at this stage, because, in this case, the learned Magistrate has only taken the cognizance against the accused. The trial is yet to begin.

(2) Dr.(Mrs) SUDHABEN S. UDAR VS VANARAJBHAI RATANBHAI JAISHWAL & ANR. 1990(1) CRIME 274. Looking to the facts and circumstances in a cited case by Shri A.J.Patel, this Court ordered to quash the process issued against the accused. At the same time, a direction was given to the trial Magistrate to hold an inquiry in the case under Sec.202 of Cr.P.C. and after conducting such

inquiry and recording evidence as he may think necessary, he was authorised to pass appropriate order, after considering evidence, as to whether there is a sufficient ground to proceed.

Thus looking to the facts and circumstances of the cited case, this Court did not find that there was a prima facie case for taking the cognizance, and therefore, the Magistrate was ordered to conduct Inquiry u/s. 202 Cr.P.C. Each case is to be decided on its own facts and circumstances. No straight jacket formula can be adopted by any court that in a particular case, no cognizance can be taken, and therefore, this authority is not helpful to revision petitioner at this stage.

9. The order which is challenged in this Criminal Revision Application is passed by the learned Magistrate within the bounds of his jurisdiction. He can take the cognizance for an offence against the accused. On reading the papers, it may happen that what conclusion arrived at by the learned Magistrate is not liked by the accused, but that does not mean that there is no prima facie case to proceed. In this case, after all judicial discretion is exercised by the learned Magistrate. He has assigned the reasons also. He read the papers and then he has come to the conclusion for issuance of process, and therefore, in no case, it can be said that this order is illegal, incorrect or perverse.

10. In view of what is discussed hereinabove, this Criminal Revision Application is devoid of merits and it is required to be dismissed, and accordingly it is dismissed. Rule is discharged.

11. As this case is very old one, the learned Magistrate is directed to dispose of the case which he has registered as Criminal Case No. 572 of 1989 (registered on 3/3/1989) pursuant to his order dt. 23/2/1989, within six months from the date of receipt of this order. He is directed to send compliance report to this Court on case being disposed of by him in accordance with law. During the course of the trial, if accused submits an application under Sec. 258 of Cr.P.C., the learned Magistrate may dispose of that application in accordance with law, considering all materials available before him by affording full opportunity to all concerned including complainant.

Date: 04/08/2000. (H.H.MEHTA,J.)
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